Supreme Court, U.S.
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In The

Supreme Court of the United States

THERESA MARIE SQUILLACOTE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. In *Rock v. Arkansas*, 483 U.S. 44 (1987), this Court found a criminal defendant's right to testify a fundamental constitutional right under the Fifth and Sixth Amendments, but since has never clarified whether that right is "personal," meaning that the right can be waived only by the accused, not by counsel or a court. Can only the accused waive her Fifth and Sixth Amendment right to testify?

2. Does a federal court have a *sua sponte* duty to conduct a colloquy with a criminal defendant to ensure that the defendant is knowingly and intelligently waiving the right to testify at trial – a right that is fundamental and essential to due process of law under the Fifth Amendment and the Compulsory Process Clause of the Sixth Amendment?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Theresa Marie Squillacote respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit below.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit appears at App. 1 to this Petition and is found at 328 Fed. App'x 174.

The Findings of Fact and Conclusions of Law, and corresponding Order, of the District Court for the Eastern District of Virginia appear at App. 3 to this Petition.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit denied Petitioner's application for a certificate of appealability on July 1, 2009, and denied her motion for rehearing and rehearing en banc on October 27, 2009. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST. amend. V provides in pertinent part:

> No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . .

U.S. CONST. amend. VI provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . .

STATEMENT OF THE CASE

In October 1998, Petitioner, Theresa Marie Squillacote, and her then husband, Kurt Stand, were tried and convicted for espionage activities related to the former German Democratic Republic in part. The conduct spanned from 1979 through the Petitioner's arrest in 1997. *United States v. Squillacote*, 221 F.3d 542, 548-52 (4th Cir. 2000).

By 1991, Petitioner was working as an attorney in the Department of Defense, where she became the director of Legislative Affairs in the Office of the Undersecretary of Defense. The FBI, which had been monitoring Petitioner and Stand's activities for several years, began clandestine electronic surveillance in January 1996. In September 1996, the FBI began a sting operation. Petitioner was arrested in

October 1997, based upon her association with an undercover FBI agent. *Id.*

Petitioner took her case to a jury in the United States District Court for the Eastern District of Virginia. (App. 3). She did not testify. (App. 28). At the close of Petitioner's case the court simply stated, "I understand, Mr. Robbins, that you have no other witnesses." (App. 28). Neither Petitioner's counsel, Mr. Robbins, nor Petitioner responded to the court. The trial record is otherwise silent on Petitioner's intent to testify.

Petitioner was convicted of conspiracy to transmit information relating to the national defense, 18 U.S.C. § 794(a) and (c); attempted transmission of national defense information, 18 U.S.C. § 794(a); improperly obtaining national defense information, 18 U.S.C. § 793(b); and making false statements in violation of 18 U.S.C. § 1001. *Squillacote*, 221 F.3d at 552. On August 11, 2000, the Fourth Circuit affirmed her convictions and sentence of 262 months on direct appeal. *Id.* at 542.

Petitioner then filed a habeas petition pursuant to 28 U.S.C. § 2255, in which she claimed in relevant part that her defense counsel did not advise her that it was her personal decision whether to testify and did not honor her decision to testify. (App. 15). An affidavit describing her proposed testimony provided an explanation for the suspicious circumstances that caused her conviction, and that she was not predisposed to espionage prior to the FBI's sting

operation. *United States v. Squillacote*, 183 Fed. App'x 393, 395 (4th Cir. 2006).

The district court denied the motion, and Petitioner appealed. The Fourth Circuit affirmed the district court's ruling on the newly discovered evidence, but vacated the district court's denial of Petitioner's claim that she was denied her right to testify due to ineffective assistance of counsel, and remanded for a hearing on that issue. *Squillacote*, 183 Fed. App'x at 395.

After a hearing at which Petitioner and her trial attorney both testified, the district court again denied Petitioner's § 2255 motion. (App. 22). On May 20, 2008, the district court held that defense counsel was not ineffective in advising his client of her right to testify at trial. Importantly, the court also decided that it was not "required to advise the defendant of the right nor must the court obtain the waiver on-the-record during trial," citing *United States v. McMeans*, 927 F.2d 162, 163 (4th Cir. 1998). (App. 20).

Petitioner applied to the Fourth Circuit for a certificate of appealability. On July 1, 2009, the Fourth Circuit decided that Petitioner had not made "a substantial showing of the denial of a constitutional right" as required by 28 U.S.C. § 2253(c)(2). It denied a certificate of appealability and dismissed her appeal. *United States v. Squillacote*, 328 Fed. App'x 174 (4th Cir. 2009). (App. 2).

On August 13, 2009, Petitioner filed a motion for rehearing and rehearing en banc. The Fourth Circuit denied the motion on October 27, 2009. (App. 25).

REASONS FOR GRANTING THE WRIT

I. The Court should clarify whether an accused's right to testify at trial is personal, meaning it only can be personally waived by the accused.

In *Rock v. Arkansas*, 483 U.S. 44, 49-53 (1987), this Court recognized that a criminal defendant's right to testify in his or her own defense is "fundamental to a personal defense." It is "one of the rights that are essential to due process of law in a fair adversary process." *Id.* at 51 (citing *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975) (quotations omitted)). "Every criminal defendant is privileged to testify in his own defense, or to refuse to do so." *Id.* at 53 (citing *Harris v. New York*, 401 U.S. 222, 230 (1971)). The criminal defendant's right to testify at her own trial is also grounded in the Compulsory Process Clause of the Sixth Amendment, which grants a defendant the right to call witnesses in her favor. *Id.* at 52. This Court recognized that "the most important witness for the defense in many criminal cases is the defendant himself." *Id.*

The right is so fundamental that in comparing the defendant's right to testify with the right of self-representation set forth in *Faretta*, 422 U.S. 806, this

Court described the accused's right to testify as "[e]ven more fundamental to a personal defense than the right of self-representation." *Rock*, 483 U.S. at 52.

The circuits are in harmony that this fundamental right to testify is personal and only can be waived by the defendant. *See Lema v. United States*, 987 F.2d 48, 52 (1st Cir. 1993); *Brown v. Artuz*, 124 F.3d 73, 77-78 (2d Cir. 1997), *cert. denied*, 522 U.S. 1128 (1998); *United States v. Pennycooke*, 65 F.3d 9, 10-13 (3d Cir. 1995); *United States v. McMeans*, 927 F.2d 162, 163 (4th Cir. 1991); *Jordan v. Hargett*, 34 F.3d 310, 312 (5th Cir. 1994); *Rogers-Bey v. Lane*, 896 F.2d 279, 283 (7th Cir. 1990); *United States v. Bernloehr*, 833 F.2d 749, 751 (8th Cir. 1987); *United States v. Joelson*, 7 F.3d 174, 177 (9th Cir. 1993); *United States v. Teague*, 953 F.2d 1525, 1532 (11th Cir. 1992) (en banc); *United States v. Ortiz*, 82 F.3d 1066, 1070 (D.C. Cir. 1996). Since *Rock*, however, this Court has not resolved whether the right to testify is a "personal" one that only can be personally waived by the defendant, and not by counsel or the court. It should do so, and confirm the collective circuit decisions to provide clarity for the second issue presented: if a defendant's right to testify is personal and only can be waived by the defendant, what is the constitutional standard for *how* that waiver is knowingly and intelligently made?

II. The Court should clarify what the Constitution requires for a valid waiver of the right to testify.

A. This Court should decide whether the defendant's silence waives her right to testify.

The circuits are split on whether a defendant waives a Fifth and Sixth Amendment claim that counsel's ineffective assistance prevented her from testifying by not personally objecting or demanding her right to testify at trial. The First, Fourth, Sixth, Eighth, and Ninth Circuits have held that if a defendant does not demand to take the stand during her trial, she is precluded from raising the issue later. *See Siciliano v. Vose*, 834 F.2d 29, 30 (1st Cir. 1987); *United States v. McMeans*, 927 F.2d 162, 163 (4th Cir. 1991); *United States v. Webber*, 208 F.3d 545, 551 (6th Cir. 2000); *United States v. Bernloehr*, 833 F.2d 749, 751-52 (8th Cir. 1987); *United States v. Martinez*, 883 F.2d 750, 760 (9th Cir. 1989), *vacated on other grounds*, 928 F.2d 1470 (9th Cir. 1991).[1] Those courts that have held the right is waived by silence, and cannot later be asserted, have reasoned that it is enough that the defendant knows of her right, either through being "educated by television and past

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[1] Some of these circuits relax the demand rule on a collateral attack alleging ineffective assistance of counsel under the Sixth Amendment as to poor advice on the right to testify or outright interference with the right. *See, e.g., Owens v. United States*, 483 F.3d 48, 58 (1st Cir. 2007).

courtroom experience," *Martinez*, 883 F.2d at 761, or through counsel's (presumed) explanation. *See Ortiz*, 82 F.3d at 1070.

The Second, Fifth, Seventh, Eleventh, and the District of Columbia circuits have taken a different tack, holding that a defendant need not object at trial to preserve the Fifth and Sixth Amendment claim that counsel prevented such testimony. *See United States v. Chang*, 250 F.3d 79, 84 (2d Cir. 2001); *United States v. Vargas*, 920 F.2d 167, 170 (2d Cir. 1990) (stating "[w]e regard as highly questionable the proposition that a defendant's failure to object at trial to counsel's refusal to allow him to take the stand constitutes a waiver . . . "); *Jordan v. Hargett*, 34 F.3d 310, 314 (5th Cir. 1994) (commenting that "[w]e think it unrealistic to expect that defense counsel will always bring this attorney-client dispute to the attention of the trial court" and that "a rule requiring the defendant personally to make such a record is inappropriate"), *reh'g en banc granted on other grounds*, 42 F.3d 1438 (1995), *and on reh'g*, 53 F.3d 94 (1995); *Underwood v. Clark*, 939 F.2d 473, 476 (7th Cir. 1991) ("recognizing that the defendant might well feel too intimidated to speak out of turn in this fashion"); *Thompson v. Battaglia*, 458 F.3d 614, 619 (7th Cir. 2006); *United States v. Teague*, 908 F.2d 752, 759-60 (11th Cir. 1991); *United States v. Ortiz*, 82 F.3d 1066, 1071 (D.C. Cir. 1996). In *Teague*, the Eleventh Circuit observed that

> [i]t would be anomalous to consider the right to counsel of fundamental importance because

> of the common lack of understanding of the trial process by defendants, and to require a defendant to rely on his attorney to be the sole spokesperson in the courtroom, while at the same time holding that by failing to speak out at the proper time a defendant has made a knowing, voluntary and intelligent waiver of a personal right of fundamental importance such as the right to testify.

Teague, 908 F.2d at 759-60.

The circuits that hold that the right is waived by a defendant's silence at trial conflict with this Court's precedent for seventy-two years in *Johnson v. Zerbst*, 304 U.S. 458 (1938), which held that a fundamental right is waived only if there is record evidence demonstrating "an intentional relinquishment or abandonment of a known right or privilege." *Id.* at 464. The circuit split as to the demand rule reveals the circuits' uncertainty as to the larger issue, which is, if this is a personal and fundamental right, what procedure to waive it passes constitutional muster?

B. Requiring a colloquy during trial would cure the circuit split on the demand rule, and make the procedure for waiver consistent with this Court's precedent.

The circuits generally agree that a district court does not have an affirmative duty to advise a defendant of his right to testify or to obtain an on-the-record waiver of that right. *McMeans*, 927 F.2d at

163; *see also Sexton v. French*, 163 F.3d 874, 882 (4th Cir. 1998).[2] Indeed, the district court below relied upon *McMeans* for that proposition. Those courts express concerns about avoiding interference with the client-counsel relationship and defense strategy. *See, e.g., Pennycooke*, 65 F.3d at 11.

Other circuits have held that there are circumstances when a colloquy is necessary and important. For example, the Seventh Circuit acknowledged that "an inquiry by the district court into the defendant's desire to testify has much to recommend it," yet still declined to find a constitutional requirement absent some evidence that the defendant was prevented from testifying. *United States v. Thompson*, 944 F.2d 1331, 1345 (7th Cir. 1991). Similarly, the Third Circuit also acknowledged that certain "exceptional, narrowly defined circumstances" might necessitate a colloquy. *Pennycooke*, 65 F.3d at 12-13. The District of Columbia Circuit commented that "where an apparent

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[2] *See also Siciliano v. Vose*, 834 F.2d 29, 30 (1st Cir. 1987); *Brown v. Artuz*, 124 F.3d 73, 79 (2d Cir. 1997); *United States v. Pennycooke*, 65 F.3d 9, 11 (3d Cir. 1995); *United States v. Brown*, 217 F.3d 247, 258 (5th Cir. 2000), *vacated on other grounds*, *Randle v. United States*, 531 U.S. 1136 (2001); *United States v. Webber*, 208 F.3d 545, 551 (6th Cir. 2000); *United States v. Brimberry*, 961 F.2d 1286, 1289-90 (7th Cir. 1992); *United States v. Bernloehr*, 833 F.2d 749, 752 (8th Cir. 1987); *United States v. Edwards*, 897 F.2d 445, 447 (9th Cir. 1989), *cert. denied*, 498 U.S. 1000 (1990); *United States v. Janoe*, 720 F.2d 1156, 1161 (10th Cir. 1983), *cert. denied*, 465 U.S. 1036 (1984); *United States v. Teague*, 953 F.2d 1525, 1533 n.8 (11th Cir.) (en banc), *cert. denied*, 506 U.S. 842 (1992).

waiver of a defendant's fundamental and personal right seems detrimental to his interests, the court may well have a duty to inquire directly of the defendant whether his action is knowing and voluntary." *United States v. Ortiz*, 82 F.3d 1066, 1071 (D.C. Cir. 1996).

Yet when rejecting a duty to undertake a colloquy, in the same breath the very same circuits express uncertainty and question the wisdom of not having the requirement. For example, in recognizing its own decision that district courts do not have a duty to conduct a colloquy with defendants, the Fourth Circuit commented that it concluded so "perhaps unwisely . . . " *Sexton v. French*, 163 F.3d at 881. Also, in *Jordan*, 34 F.3d at 314-15 & n.4, the Fifth Circuit stated that it found a rule requiring a defendant personally to make a record of his desire to testify "inappropriate." But it suggested that "[t]he uncertainty in this area could be avoided if counsel would obtain a signed statement from the defendant or if trial courts would conduct a colloquy and obtain, outside of the jury's hearing, a statement on the record from the non-testifying defendant that he is aware of his right to testify and has chosen voluntarily to waive that right." *Id. See also Thompson*, 458 F.3d at 619 (suggesting that "prudent counsel may choose to put such waivers on the record"). The circuits should be uncertain about the lack of process they require given the numerous reservations, qualifications and general lack of clarity with which the circuits have acted.

The states have done better. At least ten states and the District of Columbia require a trial judge to engage a defendant in a colloquy to find a valid waiver of the defendant's right to testify at trial.[3]

The general rule is that a personal and fundamental right is waived only if there is record evidence demonstrating "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). In most areas involving waiver of important fundamental rights of a criminal defendant, this Court has required that courts inquire directly of the defendant to ensure that his waiver is knowing and intelligent. *See Boykin v. Alabama*, 395 U.S. 238, 242 (1969) (guilty plea); *Carnley v. Cochran*, 369 U.S. 506, 516 (1962) (assistance of counsel); *Adams v. United States ex rel. McCann*, 317 U.S. 269, 277-78 (1942) (jury trial); *Johnson*, 304 U.S. at 465 (assistance of counsel); *Faretta*, 422 U.S. at 835-36 (right to refuse counsel). Indeed, in a concurring opinion, Chief Justice Burger recognized that like these other important fundamental rights, "[o]nly such basic decisions as whether

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[3] *See, e.g., LaVigne v. State*, 812 P.2d 217 (Alaska 1991); *People v. Curtis*, 681 P.2d 504, 513 (Colo. 1984); *Tachibana v. State*, 79 Haw. 226, 900 P.2d 1293 (1995); *In re Welfare of M.P.Y.*, 630 N.W.2d 411 (Minn. 2001); *Dizon v. State*, 749 So. 2d 996 (Miss. 1999); *Com. v. Lawson*, 2000 PA Super 336, 762 A.2d 753 (Pa. Super. Ct. 2000); *State v. Barnett*, 16 P.3d 74 (Wash. Ct. App. 2001); *State v. Newman*, 179 W. Va. 580, 371 S.E.2d 77 (1988); *State v. Weed*, 263 Wis. 2d 434, 666 N.W.2d 485 (2003); *Boyd v. United States*, 586 A.2d 670, 674 (D.C. App. 1991).

to . . . testify in one's own behalf are ultimately for the accused to make." *Wainwright v. Sykes*, 433 U.S. 72, 93 n.1 (1977) (Burger, C.J., concurring).

That said, this Court has allowed waiver of fundamental rights by silence in limited circumstances. *See McKaskle v. Wiggins*, 465 U.S. 168, 183 (1984) (presuming acceptance of counsel when *pro se* defendant agrees to counsel participation). But only one member of this Court has expressed the certain view that, "as a constitutional matter, all waivable rights (except, of course, the right to counsel) can be waived by counsel." *Gonzalez v. United States*, 553 U.S. 242, 128 S. Ct. 1765, 1774 (2008) (Scalia, J., concurring in the judgment). A second has entertained that possibility, but not committed. *Gonzalez*, 128 S. Ct. at 1780-81 (Thomas, J., dissenting).

This Court should clarify that because a criminal defendant's right to testify is a personal and fundamental right, even more so than the right to self-representation, federal district courts should engage criminal defendants in a direct colloquy to ensure that the right is exercised or validly waived.

> The rationale for the rule requiring the trial court to advise the defendant fully of his rights [to testify at trial] is as clear as the rule itself. Since the rights involved are fundamental to a fair trial, courts have a 'serious and weighty responsibility' to insure that the relinquishment of a vested constitutional right is made in a clear and informed manner.

Martinez, 883 F.2d at 760 (Reinhardt, J., dissenting) (citing *Johnson v. Zerbst*, 304 U.S. at 465). Absent such a colloquy, the Petitioner has not legally abandoned her personal rights.

III. Importance of the issues.

The issues presented involve a fundamental and personal right implicating not one, but two constitutional amendments. Testifying on one's own behalf is a right that this Court has characterized as even more fundamental to a personal defense than the right of self-representation. *Rock*, 483 U.S. at 52. If the right to counsel must be waived by a direct colloquy with the court, *see Carnley*, 369 U.S. at 516 ("[t]he record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer"), then certainly a more fundamental right should be waived only in the same manner. While that may be implicit in this Court's holdings in *Rock* and *Carnley*, the Court should clarify the rule given the uncertainty in the circuits.

Clarifying the rule to require a colloquy will be "protective of the defendant's right, the government's interest in finality of convictions, and the public's interest in the orderly administration of justice, as well as counsel's interest in avoiding an ineffective assistance of counsel claim . . . " *Boyd v. United States*, 586 A.2d 670, 679 (D.C. App. 1991). This case is a good example. An on-the-record waiver below in

the instant case would have removed the need for a motion made under 28 U.S.C. § 2255, an appeal, a remand, a hearing in the district court, and a second appeal of the district court's decision on the § 2255 motion.

The benefits of protecting the accused's rights and judicial efficiency will not come at the expense of improper intrusion into the attorney-client relationship as some courts have suggested. The necessary colloquy is discrete in substance and time. "[T]he colloquy should be a simple and straightforward exchange between the court and the defendant outside the presence of the jury . . . " *State v. Weed*, 263 Wis. 2d 434, 463-64, 666 N.W.2d 485, 499 (2003). It need not reveal trial strategy or privileged communications. An accused who answers simple questions in a colloquy about the right to testify (or not) never would risk self-incrimination.

Because the issues presented involve a fundamental and personal right, and requiring a court to have a direct colloquy with a criminal defendant would best protect that right and promote the orderly administration of justice, this Court should issue a writ of certiorari.

CONCLUSION

Petitioner prays that the Court grant this Petition and set the case for plenary briefing, argument, and consideration on the merits.

Respectfully submitted,

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January 25, 2010.

2009 WL 1877463 (C.A.4 (Va.))

This case was not selected for publication in the Federal Reporter.

United States Court of Appeals, Fourth Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Theresa Marie **SQUILLACOTE**, a/k/a Tina, a/k/a Mary Teresa Miller, a/k/a The Swan, a/k/a Margaret, a/k/a Margit, a/k/a Margret, a/k/a Margrit, a/k/a Lisa Martin, a/k/a Resi, a/k/a Anne, a/k/a Schwan, Defendant-Appellant.
No. 08-7020.

Submitted: April 30, 2009.
Decided: July 1, 2009.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Claude M. Hilton, Senior District Judge. (1:98-cr-00061-CMH-2; 1:02-cv-00537-CMH).

Theresa Marie Squillacote, Appellant Pro Se. Ronald Leonard Walutes, Jr., Assistant United States Attorney, Alexandria, Virginia, for Appellee.

Before MOTZ, TRAXLER, and SHEDD, Circuit Judges.

Dismissed by unpublished PER CURIAM opinion.

Unpublished opinions are not binding precedent in this circuit. PER CURIAM:

Theresa Marie Squillacote seeks to appeal the district court's order denying relief on her 28 U.S.C.A. § 2255 (West Supp. 2008) motion. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1) (2006). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2006). A prisoner satisfies this standard by demonstrating that reasonable jurists would find that any assessment of the constitutional claims by the district court is debatable or wrong and that any dispositive procedural ruling by the district court is likewise debatable. *Miller-El v. Cockrell,* 537 U.S. 322, 336-38, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003); *Slack v. McDaniel,* 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000); *Rose v. Lee,* 252 F.3d 676, 683-84 (4th Cir.2001). We have independently reviewed the record and conclude that Squillacote has not made the requisite showing. Accordingly, we deny a certificate of appealability and dismiss the appeal. We grant Squillacote's motions for judicial notice, to supplement, and to amend her informal brief; we deny her motion to file electronically. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

DISMISSED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

THERESA MARIE SQUILLACOTE, Petitioner, V. UNITED STATES OF AMERICA, Respondent.	Criminal No. 1:98cr61 Civil No. 1:02cv537

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Following remand from the United States Court of Appeals for the Fourth Circuit, this Court held a hearing to determine whether the Petitioner's trial attorneys prevented the Petitioner from testifying at trial and the Court makes the following findings of fact and conclusions of law.

Findings of Fact

1. The petitioner, Theresa Marie Squillacote, was convicted after a jury trial on October 7,1998, of Conspiracy to Commit Espionage; Attempted Espionage; Obtaining National Defense Information and False Statements. On January 22,1999, this Court imposed a sentence of 262 months of imprisonment and five years of supervised release. This conviction

was affirmed on direct appeal, *United States v. Squillacote,* 221 F.3d 542 (4th Cir. 2000), and the Supreme Court denied her petition for a writ of *certiorari*. 532 U.S. 971.

2. Following the Court's denial of her motion pursuant to 28 U.S.C. § 2255, the Petitioner appealed. The Fourth Circuit thereafter remanded this case for a hearing to determine whether her trial "attorneys prevented her from exercising her right to testify." *United States v. Squillacote,* 183 Fed. Appx. 393, 394 (4th Cir. 2006). In accordance with the Fourth Circuit's Mandate, this Court scheduled an evidentiary hearing for April 11,2007, having granted petitioner's request for additional time. At the hearing on April 11,2007, Petitioner called three witnesses and took the stand on her own behalf.

3. Michael E. Tigar testified for the Petitioner. He indicated that, although he has never met Petitioner, he did have a conversation with her in December 2001 or January 2002, where they discussed possible appellate issues in her case.

4. Petitioner's brother, Michael Squillacote, next testified for Petitioner. He testified concerning the process by which Petitioner elected to replace Court-appointed counsel with retained trial counsel of her choosing. He recalled engaging in a process whereby they interviewed five or six different lawyers and researched the Court-appointed counsel already representing Petitioner. Petitioner selected Lawrence Robbins, as she was impressed by his background and

was aware of his appellate and former prosecutorial experience.

5. Around the time of her trial, Michael Squillacote recalled his sister as being in what he described as a "permanent state." He recalled frequent "fights and disagreements" with her lawyers and in particular she was "very disturbed" with her husband's lawyer, Richard Sauber. He described Petitioner's relationship with her own counsel as "They weren't going to be friends at the end of it. It was hard. Terri was, you know, really trying to get what she wanted done the way she wanted it done."

6. Michael Squillacote recalled coming to Petitioner's lawyer's office and learning that he would not be called as a witness because the perceived cross examination would be harmful to petitioner's case. He recalled a series of explanations as to why he would not be a good witness. He recalled being told that there was no time to be spent preparing Petitioner because her testimony would undercut their defense. That it was a psychiatric defense, and they didn't want her to seem too credible or too logical to the jury.

7. Petitioner next called her trial counsel, Lawrence Robbins, to testify. He is currently a partner in the law firm of Robbins, Russell, Englert, Orseck & Untereiner. Robbins was retained by Petitioner not long after her arrest and detention in the Fall of 1997. At the time of his hiring, Robbins was a partner at Mayer, Brown and Platt. He was assisted

by other lawyers from the firm including Lee Rubin, Ed Lee and at least one paralegal. During the extensive motion practice on behalf of Petitioner, Robbins was assisted by other lawyers, to include Allen Untereiner. Robbins graduated from Harvard Law School magna cum laude in 1978, clerked for the Honorable John L. Gibbons of the United States Court of Appeals for the Third Circuit and passed the New York Bar in 1980. He is also a member of the District of Columbia Bar.

8. After his clerkship, Robbins practiced law at the law firm of Kramer, Levin, Nessen, Kamin & Frankel in New York City for three and one-half years where he handled or assisted in handling several criminal defense cases. Robbins next joined the Criminal Division of the United States Attorney's Office for the Eastern District of New York where he practiced for three years and first-chaired 25 to 30 criminal cases. He also handled approximately twenty-four criminal appeals in the United States Court of Appeals for the Second Circuit during this period.

9. In May 1986, Robbins joined the United States Solicitor General's Office as an Assistant to the Solicitor General. He held this position for four and one-half years and argued twelve cases – seven of which were criminal – before the United States Supreme Court. Robbins has since argued five more cases before the Supreme Court for a total of seventeen. One of Robbins' areas of responsibility while in the Solicitor's Office was Fifth Amendment

litigation; further, *Rock v. Arkansas* was decided by the Supreme Court in 1987, while Robbins was working in the office and in his area of responsibility. Robbins argued two Fifth Amendment cases in the United States Supreme Court and had a detailed familiarity with the Fifth Amendment, burdens on the right to testify, and who owns the right to testify.

10. In 1990, Robbins joined the Office of the Independent Counsel investigating the Department of Housing and Urban Development, where he served for two years. He ultimately tried one criminal case in this position in the United States District Court for the District of Columbia. In 1992, Robbins joined the D.C. office of the law firm of Mayer, Brown & Platt as a partner. It is from this position that the petitioner hired Robbins to represent her at trial in this case. Among the wide array of criminal defense matters he handled while at Mayer, Brown & Platt before being retained in this instant case, Robbins represented the founders and former CEO and COO of a large hospital corporation in a criminal investigation, a corporate officer under federal criminal investigation in Maryland, a former military officer in a criminal conflict-of interest case, a defendant under indictment pursuant to the federal arson statute, a psychiatrist accused of defrauding a federal grant program, and a ship owner accused of perjury.

11. Since representing the petitioner at trial, Robbins has, in conjunction with his partners, represented members of the White House staff, the President and Mrs. Clinton, a former Cabinet officer

and an Arthur Anderson partner alleged to have participated in the Enron audit. These were offered by Robbins as examples of his criminal defense work.

12. Robbins also testified concerning a call he received from Petitioner's present counsel on April 17,2002. Although Robbins was not then aware that Petitioner had filed a Section 2255 petition, he told Petitioner's counsel that he would dispel any suggestion that Petitioner was not effectively represented. Robbins also recalled that during this conversation in April, 2002, the Supreme Court's holding in *Rock v. Arkansas* was misrepresented. He testified that he reread the Supreme Court opinion after the call to confirm his own recollection of the holding. He indicated that he would not be a good witness for Petitioner on the question of her right to testify.

13. Robbins believes that Petitioner's trial was his best work in his thirty-year career practicing law. He strongly believes Petitioner's instant motion, alleging that trial counsel interfered with her right to testify in her own defense at trial, is frivolous. His affidavit' was filed in an effort to provide as clear a record for this Court as he could concerning the facts and circumstances of this case. In particular, he wanted to specifically rebut Petitioner's allegation that she was not advised of her right to testify. Both Robbins and Lee Rubin, advised Petitioner of her right to testify. Robbins testified that he is certain he so advised his client. Robbins additionally recalled advising Petitioner at length why he urged her not to

exercise her right to take the stand in her own defense. He noted that his 2002 affidavit listed some, but not all, of the reasons he gave his client not to exercise her absolute right to testify. He reviewed the pros and cons of testifying as well as reviewed the anticipated testimony of witnesses and the government's evidence with Petitioner while preparing for trial.

14. Robbins testified that Petitioner agreed with their advice and never once said she wished to testify at trial over the advice of her counsel. In fact, the defendants planned to have Petitioner's then-husband and co-defendant, Kurt Stand, take the stand if anyone testified. The objective was to provide an innocent explanation, if one could be given, for their behavior. This strategy would shield Petitioner from undercutting the thrust of her entrapment and psychiatric defenses and conversely fortify the government's predisposition case by revealing facts about her prior conduct then unknown to the government. Robbins was unequivocal that Petitioner never expressed any interest in taking the stand at trial. He thought then – and still thinks today – that Petitioner's testimony would have been exceedingly damaging to her defense.

15. Robbins avoided revealing in detail every factor he discussed with Petitioner out of concern that he might violate an ethical restraint, but gave examples of information the defense believed was unknown to the government that would adversely impact Petitioner's defense strategy at trial. There

was a real risk that if she took the stand evidence barred from the government's case in chief due to rulings might become admissible on cross examination. For example, Petitioner would have been constrained to explain her relationship with the East German intelligence service during the period of her employment with the Defense Department. Petitioner would be hard pressed to explain the circumstances of her affiliation with an agent of the East German intelligence service, HVA or Stasi. A detailed elaboration of that relationship would not have been helpful to the defense. How Petitioner came to possess a small camera would not have been helpful to the defense. Details of Petitioner's activities in East Germany, to include receiving recognition from the East German government, would not have been helpful to the defense. Indeed, at this point in his testimony, Robins advised Petitioner's 2255 counsel against revealing any further details that influenced his judgement and professional advice; accordingly, 2255 counsel withdrew the question.

16. Robbins further testified that he believed, and advised Petitioner, that her testimony would serve to undercut the persuasiveness of their psychiatric defense involving a diagnosis of borderline personality disorder. He also felt the cross examination would be particularly damaging from an experienced espionage prosecutor and so advised his client.

17. Robbins testified that he had numerous discussions with the Petitioner concerning her right to testify throughout the course of his representation of

her. These conversations occurred both over the telephone and in person. Robbins and his co-counsel told Petitioner that the decision to testify in the final analysis was hers to make.

18. Robbins spoke with Petitioner at length and in detail concerning the story she would tell if she took the stand. The story of a secret underground movement opposing fascism, even if told persuasively and shielded effectively from cross-examination, would, in Robbins' professional judgment, have been difficult for a lay jury to accept. Accordingly, trial counsel offered Petitioner their strategic advice that testifying would have almost exclusively downside risk with virtually no upside.

19. Robbins engaged mental health experts to assist with his representation of Petitioner at trial. He was fully aware of their perception of her mental condition and their collective opinion that this did not impact with cognitive abilities. Robbins testified that petitioner had a high degree of intellectual sophistication and could process information, formulate thoughts, and articulate them. His client was bright and what mental challenges she had did not impact upon her reasoning and cognition. He never considered his client "crazy" nor did he treat her as such. Petitioner was an attorney at the time she engaged trial counsel and in Robbins' judgment, was a sophisticated client with respect to her knowledge of legal matters. Trial counsel felt she was intelligent, engaged in her defense and often initiated proposals for her defense team.

20. Robbins testified that he worked with his client to formulate her defense, that it was a collaborative effort and at times involved extensive discussion to reach a resolution with his client. At all times during his representation, Robbins appreciated that the decision of whether Petitioner would take the stand was her decision to make. Robbins testified that the decision not to testify was his client's and the decision was sound and fully vetted with her. No members of Petitioner's trial team interfered with petitioner's right to testify in her own defense. No time before or at trial, did Petitioner ask to testify. Robbins never bullied or coerced his client nor did he ever witness such conduct by another member of the defense team or co-defendant's defense team and that no member of Petitioner's family conveyed to him a desire on her part to testify at trial.

21. Petitioner testified she graduated from the University of Wisconsin, Milwaukee, with a Bachelor of Arts degree in History in June 1978. In 1980, she received a Master's in History from the same institution. She received her law degree from Catholic University in 1983. Subsequent to receiving her law degree, Petitioner enrolled in and took a number of courses toward a Master of Law degree and George Washington University. Petitioner also took a post graduate course at Catholic University after receiving her law degree. In total, Petitioner has four years of college and five years of post graduate studies. Petitioner sat for and passed the District of Columbia bar examination the first time she took it. At the time

of her arrest she had practiced law for approximately thirteen to fourteen years. She received awards for her work in streamlining procurement laws in the Department of Defense. She claimed, however, that she possessed only limited knowledge of criminal law before her arrest.

22. Petitioner and her husband received court-appointed counsel at their first appearance who Petitioner then chose to replace with retained counsel. Petitioner, with considerable assistance from her family and in particular, her father, who was a judge, selected Lawrence Robbins. Richard Sauber was retained for petitioner's husband. Robbins seemed, in petitioner's judgement, to be the more capable attorney. These attorneys brought to the defense team the combined resources of their respective law firms, Mayer, Brown & Platt and Fried, Frank. Petitioner characterized her relationship with counsel as a "mixed bag", but noted that Robbins was solicitous and interested in her opinion, thoughts, and input while he represented her. Petitioner, however, opined that she did not have as great an opportunity to offer input at trial as she did during pre-trial.

23. Petitioner testified that Robbins would alert her to times when she had a decision to make during his representation of her. He would lay out the pros and cons and then seek from Petitioner her decision. Robbins would review the disadvantages and advantages with her before seeking her decision.

24. Petitioner testified that she understood pretrial that she was available as a potential witness in her own defense. She testified that she did not know it was a personal fundamental right. Petitioner admitted that, after her petition for a writ of certiorari was denied on direct appeal, she assembled a package to distribute to possible habeas counsel because she was aware of the time constraints. In this package of materials assembled by Petitioner without the assistance of counsel, she included in her cover letter a discussion of her desire to testify as a possible habeas issue.

25. Petitioner claimed that three times pretrial and two times during trial, she told Robbins that she wanted to testify at trial. She further claimed that Robbins was present during these discussions. She recalled counsel discussing the pros and cons of testifying in her own defense. Petitioner recalled Robbins, consistent with his testimony before her on April 11,2007, expressing to her his concern that she would appear to the jury as too articulate, too smart, too together and that these aspects of her personality would undercut the defense that she was especially vulnerable to the government's sting operation. Petitioner additionally recalled that Robbins also counseled her that she would reveal details unknown to the government or barred from the government's case-in-chief if she testified. She also recalled then being advised that the cross examination would be withering, as Robbins had noted in his testimony.

Petitioner acknowledged that she may have forgotten additional concerns expressed to her by her counsel.

26. Petitioner testified that she was not told it was her decision to make in a comparable way to the other instances where her attorney informed her that she had a decision to make. According to Petitioner, whereas in other areas she was clear that she had a decision to make, she was not clear with respect to her right to testify. Petitioner testified that she never said she did not want to testify. In fact, Petitioner later claimed she had made a decision to testify at trial. Petitioner testified that she was aware of the limited criminal defense experience of her counsel when she retained him, but that she had trust and confidence in him at trial. Petitioner also testified that there were no mock exercises involving Petitioner to practice testifying.

27. Petitioner testified that the reasons given her by her counsel advising against testifying were not persuasive. That she could have offered an innocent explanation for some of the government's evidence, such as a Casio RAM card. She could offer an explanation for her clandestine relationship with the East Germans.

28. During the almost five years petitioner was represented by Robbins, she never sought to communicate with this Court concerning the quality of her representation. Petitioner never alerted this Court at any point prior to her § 2255 petition, filed in 2002, to any problem with her representation. She

did not express any dissatisfaction about her representation to the presentence report writer. In fact, Petitioner told the presentence report writer that upon the advice of her, counsel she did not wish to make a statement.

29. Petitioner testified that her 2002 affidavit was a joint product of her and her 2255 counsel. Petitioner characterized her trial counsel as good aggressive attorneys who vigorously pursued their defense of her, and that her trial counsel devoted a great deal of time and energy to her defense. Petitioner appreciated that her counsel were focused upon how a trial jury might react to evidence introduced at trial. She appreciated that it was her attorney's job to gauge how her testimony might be received by a jury.

30. Petitioner agreed then, and still today believed, a joint defense with her husband was the strategically sound decision. She testified that she was aware that her husband, in his affidavit, admitted he was aware of his right to testify at trial. Petitioner was aware that he had written that he had elected not to testify at trial.

31. Professor Michael Tigar testified to having a telephone conversation with Petitioner five years ago, after her direct appeals were exhausted. It was his sense that the Petitioner was surprised to hear she had the right to testify in her own defense. Professor Tigar has never personally met Petitioner and his contact with her was limited to infrequent telephone

calls and some written communications. Given the nature and circumstances of this contact, and the isolated comment recalled by this witness, little weight can be given to his testimony.

32. Petitioner's brother briefly testified as to the circumstances surrounding the end of Petitioner's trial nine years ago. Although he first testified that he was summarily informed by Petitioner's trial counsel that he would not be called as a witness, he elaborated that Petitioner's trial counsel continued to identify a number of strategic reasons to explain the decision. This testimony does not address the sole issue before this Court, whether Petitioner's trial attorneys violated her right to testify. Accordingly, this Court assigns little weight to his testimony.

33. This court credits the testimony of Petitioner's trial counsel, Lawrence Robbins. This Court carefully observed Mr. Robbins during the course of his lengthy testimony. Mr. Robbins' demeanor along with his candid responses to Petitioner's counsel's questions lead this Court to credit Mr. Robbins' testimony. Also, the vast majority of Mr. Robbins' testimony was corroborated by the Petitioner herself. It is that Petitioner was fully advised of her right to testify and no one interfered with Petitioner's right to testify.

34. In contrast, this Court does not credit Petitioner's claim that, although she was aware she could be a witness, she was not aware that it was her own decision whether to testify. During the time of

her trial, Petitioner was a member of the bar and practicing attorney. She had five years of post graduate education with a law degree and one masters degree and studying toward obtaining a second masters degree. She was an intelligent, well educated individual who had been an attorney for almost fourteen years at the time of her arrest. Second, Petitioner carefully parsed her words during the cross examination and described her trial attorney's testimony in dramatic and hostile terms. Yet she simultaneously admitted that her trial counsel permitted and was comfortable with Petitioner routinely consulting outside counsel and reviewing her legal counsel's advice and written pleadings. She further testified that her trial counsel reviewed with her the advantages and disadvantages of decisions that she needed to make throughout the course of her representation. In addition, she testified that her counsel sought her input during the representation of her. Third, trial counsel and Petitioner essentially disagree only on this one salient point, i.e. whether Petitioner understood that it was her decision to testify. Their testimony otherwise is almost entirely consistent. Petitioner testified before this Court that she was pleased with her counsel's energy and effort in her defense. That her counsel laid out the advantages and disadvantages to her, encouraged her input and sought her decision. Her counsel even permitted Petitioner to regularly seek outside advice and second opinions to test her legal representation. Her brother testified that Petitioner was forceful that everything be done her way during the course of her

own pretrial and trial preparations. It is not credible that on this single issue Petitioner would sit quietly without seeking to alert the Court to a concern, particularly where she was a practicing attorney fully aware of the Court's role in a criminal case. Fourth, the fact that the Petitioner explicitly refused to make a statement when interviewed during the presentence investigation immediately after her conviction at trial upon the advice of her counsel corroborates this Court's conclusion. This Court has often seen defendants seek new counsel post conviction and seek the Court's intervention. Yet Petitioner continued to follow the advice of her counsel and elected not to make a statement post conviction. Finally, Petitioner has a substantial bias in that every appeal available to her has now been exhausted but one. She has produced no notes or written communication made contemporaneous to the trial memorializing a problem with her counsel.

35. In sum, this Court does not credit Petitioner's claim to have been unaware of her right to testify. The Court is completely satisfied that Petitioner was informed of her right to testify. Her counsel reviewed with her the advantages and disadvantages of her taking the stand and she followed her counsel's advice and waived her right to testify in her defense. This Court finds as a matter of fact that her counsel did not interfere with her right to testify.

Conclusions of Law

This matter was remanded to this Court to make findings as to the merits of Petitioner's ineffective assistance claim. The Court is guided by the Fourth Circuit's holding that a court is not required to advise the defendant of the right nor must the court obtain the waiver on-the-record during trial. *United States v. McMeans,* 927 F.2d 162, 163 (4th Cir. 1991); *see Sexton v. French,* 163 F.3d 874, 881 (4th Cir. 1998). "To waive the right, all the defendant needs to know is that the right to testify exists." *McMeans* at 163.

This hearing was limited to the first prong of *Strickland v. Washington,* 466 U.S. 668, 694 (1984), whether petitioner could show that her attorneys violated her right to testify at trial. As the credited testimony of Mr. Robbins' revealed, his assistance at Petitioner's trial was in no way deficient. Quite to the contrary, Mr. Robbins provided Petitioner with excellent representation. In particular, as this Court has found as a matter of fact that Petitioner's counsel did nothing to "prevent[ ] her from exercising her right to testify", *Squillacote,* 183 Fed Appx. at 394, Petitioner's counsel were not deficient in this particular regard.

Strickland teaches that "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." 466 U.S. at 689. Absolutely nothing in the present record causes this Court to ignore this presumption. The Court is not going to go behind

counsel's professional advice that Petitioner not take the stand. Robbins' judgment that a jury would have difficulty accepting petitioner's story of a clandestine underground movement is not unreasonable. The reasons tendered by trial counsel in his testimony are reasonable strategic factors to be weighed. For example, Petitioner appears before this Court as an articulate individual in control, parsing words on cross examination and refusing to be lead by the government attorney on cross examination. Robbins' concern that such an impression would have served to undercut the mental health argument and entrapment defense is not unreasonable.

In light of this Court's conclusion that Petitioner's counsel was in no way deficient, as that term is defined by *Strickland,* this Court need not even reach the prejudice prong of the ineffective-assistance test. Nonetheless, this Court does note that any "potential prejudice", *Squillacote,* 183 Fed. Appx. at 194, that Petitioner has identified relates only to her proposed testimony.

The Court did not need to hear from Petitioner's mental health expert tendered by Petitioner. The Court recalls trial in this case. The issue before this Court is not a mental health question, but a legal question. Defense counsel reasonably calculated the jury's reaction to the Petitioner's performance on the witness stand. A jury is instructed that they are free to disregard an expert's opinion and a competent trial attorney must weigh the concern that a jury would do just that. The issue is not what a mental health

expert would opine, but what a trial jury would believe.

For these reasons Petitioner's motion pursuant to 28 U.S.C. § 2255 should be denied.

/s/ Claude M. Hilton
CLAUDE M. HILTON
UNITED STATES
DISTRICT JUDGE

Alexandria, Virginia
May 20, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

THERESA MARIE SQUILLACOTE, Petitioner, V. UNITED STATES OF AMERICA, Respondent.	Criminal No. 1:98cr61 Civil No. 1:02cv537

ORDER

This matter comes before the Court on the Petitioner's motion to vacate, set aside, or correct sentence, pursuant to 28 U.S.C. § 2255. For the reasons stated in the accompanying Findings of Fact and Conclusions of Law, it is hereby

ORDERED that the Petitioner's motion is DENIED.

The Clerk is directed to send a copy of this Order and a copy of the accompanying Memorandum Opinion to the petitioner and to the United States Attorney of this District.

/s/ Claude M. Hilton
CLAUDE M. HILTON
UNITED STATES
DISTRICT JUDGE

Alexandria, Virginia
May 20, 2008

FILED: October 27, 2009

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-7020
(1:98-cr-00061-CMH-2)
(1:02-cv-00537-CMH)

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

THERESA MARIE SQUILLACOTE, a/k/a Tina, a/k/a Mary Teresa Miller, a/k/a The Swan, a/k/a Margaret, a/k/a Margit, a/k/a Margret, a/k/a Margrit, a/k/a Lisa Martin, a/k/a Resi, a/k/a Anne, Schwan,

Defendant-Appellant

ORDER

The Court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Chief Judge Traxler, Judge Motz, and Judge Shedd.

For the Court

/s/ Patricia S. Connor, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA -vs- THERESA MARIE SQUILLACOTE and KURT ALAN STAND, Defendants.	Cr. No. 98-61-A VOLUME 9 OF 10

TRIAL TRANSCRIPT

October 7-23, 1998

Before: Claude M. Hilton, Judge

And a Jury

APPEARANCES:

Randy I. Bellows, Robert A. Spencer and Michael C. Liebman, Counsel for the United States

Lawrence S. Robbins, Lee H. Rubin and Edward S. Lee, Counsel for Defendant Squillacote

Richard A. Sauber, Douglas W. Baruch, David B. Wiseman and Nina Y. Wang, Counsel for Defendant Stand

The Defendants, Theresa Squillacote and Kurt Stand, in person

* * *

[1568] MR. RUBIN: Okay. No further questions.

MR. BELLOWS: Just one question. I know, Your Honor, just one question.

RECROSS-EXAMINATION

BY MR. BELLOWS:

Q Is it your impression that she was a child when this event occurred or that these were toys?

A No.

MR. BELLOWS: Nothing further.

THE COURT: All right. Thank you, you may step down. You may be excused.

NOTE: The witness stood down.

THE COURT: I understand, Mr. Robbins, that you have no other witnesses.

But you have a short witness we can call right now?

MR. SAUBER: Yes, Your Honor.

THE COURT: All right. Call Kate Alleman to the stand, please.

THE COURT: You are still under oath.

KATHARINE ALLEMAN, a witness called by counsel for the defendant Stand, having been previously sworn, testifies and states:

DIRECT EXAMINATION

BY MR. SAUBER:

Q Good afternoon. Good morning, Agent Alleman.

* * *